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No. 95-1065

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

REVEREND PAUL SCHENCK and
DWIGHT SAUNDERS, *et al.*,
Petitioners,

v.

PRO-CHOICE NETWORK OF WESTERN
NEW YORK, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* FAMILY RESEARCH COUNCIL URGING REVERSAL

CATHLEEN A. CLEAVER
Counsel of Record
Family Research Council
700 Thirteenth Street, NW
Suite 500
Washington, D.C. 20005
(202) 393-2100

19 pp

QUESTION PRESENTED

Should people going to or coming from an abortion clinic be classified as a "captive audience" in order to save an otherwise unconstitutional prior restraint on speech in a classic public forum?

TABLE OF CONTENTS

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES vi

INTEREST OF THE *AMICUS CURIAE*.....1

STATEMENT OF THE CASE.....1

SUMMARY OF THE ARGUMENT.....1

LAW AND ARGUMENT.....2

I. INTRODUCTION 2

A. THE CONSTITUTIONALITY OF AN INJUNCTION REQUIRES A FACT-INTENSIVE ANALYSIS; THE FACTUAL RECORD HERE IS SLIM. 3

B. RESPONDENTS BEAR THE BURDEN OF OVERCOMING THE HEAVY PRESUMPTION AGAINST VALIDITY OF PRIOR RESTRAINT OF PETITIONER'S SPEECH IN PUBLIC. 4

C. RESPONDENTS DID NOT RAISE THE CAPTIVE AUDIENCE DOCTRINE BELOW; THIS COURT SHOULD NOT RELY ON AN UNASSERTED CLAIM TO SAVE THE OFFENSIVE SPEECH BAN. 6

II. THE "CAPTIVE AUDIENCE" DOCTRINE DOES NOT APPLY TO THE FACTS OF THIS CASE.....7

A. RESPONDENTS HAVE NO REASONABLE EXPECTATION OF SUBSTANTIAL PRIVACY IN PUBLIC AREAS AROUND ABORTION CLINICS.....9

1. Right To Substantial Privacy Exists In The Home, But Is Not Absolute......9

2. Outside the Home, the Right of Privacy of an Unwilling Listener is Sharply Limited......10

3. Madsen's "Medical Privacy" Is Not Applicable to This Case......14

B. EVEN IF RESPONDENTS HAVE A SUBSTANTIAL PRIVACY INTEREST IN PUBLIC AREAS AROUND ABORTION CLINICS, THEY CANNOT BE A CAPTIVE AUDIENCE BECAUSE THEY HAVE READY MEANS OF "ESCAPE" AND PETITIONERS' SPEECH IS NOT "INTOLERABLE." 15

1. The Government Cannot Prohibit Speech To FurtherPrivacy Interests If The Unwilling Listener Can Avoid Exposure......15

2. The Record Does Not Show That Persons Entering Or Leaving The Abortion Clinics Have No Means To Escape The Messages Of Petitioners......17

C. *MADSEN* IS NOT DISPOSITIVE ON THE ISSUE OF CAPTIVE AUDIENCE.....19

D. EVEN IF RESPONDENTS HAVE A SUBSTANTIAL PRIVACY INTEREST IN PUBLIC AREAS AROUND ABORTION CLINICS, THE POTENTIAL INFRINGEMENT OF THIS INTEREST IS NOT CONSIDERABLE OR INTOLERABLE.....24

1. There Are Many Examples Of Individuals Being Compelled To Listen To Messages They Might Otherwise Choose Not To Hear.....25

2. Petitioners' Speech Is Potentially Beneficial.....27

III. CONCLUSION.....28

TABLE OF AUTHORITIES

CASES

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983).....16
Carey v. Brown, 447 U.S. 455, (1980).....9
Cohen v. California, 403 U.S. 15, (1975).....*passim*
Consolidated Edison v. Public Service Commission, 447 U.S. 530 (1980).....*passim*
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).....*passim*
Frisby v. Schultz, 487 U.S. 474 (1988).....*passim*
Gregory v. Chicago, 394 U.S. 111 (1969).....8
Kovacs v. Cooper, 366 U.S. 77 (1949).....13
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).....*passim*
Madsen v. Women's Health Center, Inc., _ U.S. _, 114 S.Ct. 2516 (1994).....*passim*
Martin v. Struthers, 319 U.S. 141 (1943).....10
Org. for a Better Austin v. Keefe, 402 U.S. 415 (1971).....4, 8, 25
Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. _, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).....20, 26
Pro-Choice Network of Western New York v. Project Rescue Western New York, 799 F. Supp. 1417 (W.D.N.Y. 1992).....*passim*
Pro-Choice Network of Western New York v. Schenck, 67 F.3d 377, at 402-03 (2d Cir. 1995).....4
Public Utilities Comm'n v. Pollack, 343 U.S. 451 (1952).....2, 15
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).....25
Rowan v. United States Post Office, 397 U.S. 728 (1970).....*passim*

STATUTES

42 U.S.C. § 1985(3) 6
Omnibus Budget Reconciliation Act of 1990, Public Law 101-508 §§ 4206, 4751 26

OTHER AUTHORITIES

Patrick J. Flynn, *Street Preachers Versus Merchants: Will the first Amendment Be Held Captive in the Balance?*, 14 St. Louis U.Pub.L.Rev. 613 (1995) 7, 11
Franklyn S. Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?*, 67 Nw.U.L.Rev. 153 (1972) 12
Marcy Strauss, *Redefining the Captive Audience Doctrine*, 13 Hastings Const.L.Q. 85 (1991) 7, 16

INTEREST OF THE *AMICUS CURIAE*[*]

Family Research Council, Inc. is a voice for the pro-family movement in Washington, D.C. Family Research Council is a non-partisan, non-profit organization dedicated to the preservation and defense of the family and committed to work as an advocate for the family to all branches of government. The Family Research Council believes in the sanctity of life from the moment of conception until natural death.

STATEMENT OF THE CASE

Family Research Council incorporates by reference the facts set forth in petitioners' brief on the merits.

SUMMARY OF THE ARGUMENT

The "Captive Audience" doctrine does not apply to the present case because respondents' interests in privacy do not outweigh the right of petitioners and others to free speech in a traditional public forum.

Respondents do not have a reasonable expectation of substantial privacy in public areas around abortion clinics, and therefore they cannot ask the government to silence speakers on their behalf. Where the expectation of privacy is not reasonable, as is likely when the listener is in public, the "captive audience" doctrine should not apply.

Still, even if respondents did have some privacy interest in this classic public forum, they have the means to

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[*] This brief was submitted with the written consent of the parties, filed with the clerk of this Court.

avoid further unwanted speech, and the imposition on their privacy is, therefore, not substantial. Where, as here, infringement on privacy is only incidental, the captive audience doctrine will not override the rights of the speaker to free speech.

The *Madsen* opinion deferred to the findings of the Florida court on governmental interest, and did not adopt the state court's views on captive audience or medical privacy for its decision. Therefore, *Madsen* does not control the outcome of this case.

LAW AND ARGUMENT

I. INTRODUCTION

"To many, the immediate consequence of [the] freedom [to speak] may often appear to be only verbal tumult, discord . . . in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve." *Cohen v. California*, 403 U.S. 15, 24-5 (1975).

The First Amendment Freedom of Speech Clause guarantees more than simple communication of ideas by speakers. It also protects those persons on the other end of communication, the listener. The listener has a right under the First Amendment to receive information and a right not-to-listen, and, in narrow circumstances, he also has a constitutional right of privacy to be left alone. *See Public Utilities Comm'n v. Pollack*, 343 U.S. 451, 466 (1952) (Black, J., dissenting in part); *id.* at 467-69 (Douglas, J., dissenting); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); and *Rowan v. Post Office Dept.*, 397 U.S. 728, 736 (1970).

The interests of both speaker and listener are so fundamental to a free society and the concept of ordered liberty, that neither interest automatically overrides the other. Courts must take care when these interests come into potential conflict and are placed in the scales to be weighed against each other. Depending upon the totality of the circumstances, sometimes the right of the speaker to proclaim his message will prevail over the interests of the listener, other times, the right of the listener to be left alone will require the speaker to refrain from speaking to that listener.

A. THE CONSTITUTIONALITY OF AN INJUNCTION REQUIRES A FACT-INTENSIVE ANALYSIS; THE FACTUAL RECORD HERE IS SLIM.

Since this case involves the propriety and constitutionality of an injunction, the facts and the record are very important to its resolution.

The District Court below paints with a broad brush in making its "findings." These findings appear to be neither evidentiary nor factual in nature, as is required to justify such an injunction and to permit an intelligent appellate review. Instead, the District Court submits opinion, conclusion, and editorial comment as fact. Nowhere does the District Court point to specific, individual acts of the petitioners, nor does the court explain what the supposed "harassment" was, or how sidewalk counseling, peaceably conducted, constituted "intimidation." Apparently, the conduct of pro-life demonstrators is in some way wrongful merely because their speech is in opposition to abortion. *See generally Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992).

The Circuit Court is equally vague in its recitation of the factual record. As the dissent in the *en banc* decision

below noted, when the record is this inadequate, there can be no justification for upholding the injunction.

> Such ambiguous statements, however, hardly prove adequate to assure the 'precision of regulation' demanded by *Madsen*. . . . [and] no constitutional freedom, least of all the guarantees of the Bill of Rights, [may] be defeated by insubstantial findings of fact screening reality.

Pro-Choice Network of Western New York v. Schenck, 67 F.3d 377, at 402-03 (2d Cir. 1995) (Meskill, J., dissenting).

B. RESPONDENTS BEAR THE BURDEN OF OVERCOMING THE HEAVY PRESUMPTION AGAINST VALIDITY OF PRIOR RESTRAINT OF PETITIONER'S SPEECH IN PUBLIC.

Respondents bear the burden of overcoming a heavy presumption against the constitutionality of their injunction's prior restraint on speech in public. When reviewing an injunction prohibiting peaceful leafleting which criticized the business practices of the respondent, the Court recognized the paramount importance of free speech by striking the injunction. *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971). While weighing the intrusion into the privacy of the respondent against First Amendment concerns, the Court stated that:

> Any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity. Respondent thus carries a heavy burden of showing justification

> for the imposition of such a restraint. . . Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature . . . The right of privacy involved in [*Rowan*] is not shown here.

Id. at 419-20.

This Court continued to affirm the weighty presumption against prior restraint of public speech in subsequent cases. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975), for example, the Court stated that "when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." And in *Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 534 (1980) (internal citations and quotations omitted):

> The First and Fourteenth Amendments remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.

C. RESPONDENTS DID NOT RAISE THE CAPTIVE AUDIENCE DOCTRINE BELOW; THIS COURT SHOULD NOT RELY ON AN UNASSERTED CLAIM TO SAVE THE OFFENSIVE SPEECH BAN.

This case involves a dispute between private litigants. The provisions at issue are not statutory provisions advancing a government interest. Consequently, the only government involvement is adjudication and the only government interest is the protection in equity of asserted interests of the parties. It is well-established that courts may grant only the relief prayed for and consider only those interests actually asserted by the parties. In doing so, courts will not go outside the pleadings to justify relief given.

Here, respondents did not assert in their pleadings, original or as amended, *any* First Amendment interests, either as a right not-to-listen in privacy, or otherwise.[1] Since respondents apparently make their claim of being a captive audience only here on appeal, it should not be considered as a justification for the injunction. Neither should respondents' right to be left alone be considered as a government interest to be balanced against the fundamental First Amendment

[1] The District Court stated in its opinion, *Pro-Choice Network*, 799 F. Supp. at 1422, that respondents made seven claims in this case, involving: (1) equal protection, privileges and immunities of national citizenship, right to interstate travel, and right to abortion under a 42 U.S.C. § 1985(3) claim (which were all later dismissed by 828 F. Supp. 1018 (W.D.N.Y. 1993)); and (2) six causes of action under state statutory and common law. No First Amendment privacy right to be left alone and not to be captive to petitioners' messages were pleaded.

speech interests of pro-life advocates or as any defense to this oppressive injunction.

II. THE "CAPTIVE AUDIENCE" DOCTRINE DOES NOT APPLY TO THE FACTS OF THIS CASE.

This Court has instructed that the "captive audience" doctrine may save on otherwise invalid prior restrain only when the audience has a reasonable expectation of substantial privacy and that privacy interest is substantially violated.

Where the expectation of privacy is not reasonable, as is likely when the listener is in public, the "captive audience" doctrine should not apply. Where the expectation is reasonable, but the privacy interest is less than compelling, the "captive audience" doctrine will not outweigh the speaker's right to free speech. Similarly, where there is a reasonable expectation of substantial privacy, but the infringement on the privacy is only incidental and not pervasive, the doctrine will not override the rights of the speaker. Only when the imposition on substantial listener privacy is so unduly burdensome as to be "intolerable" will the unwilling listener's First Amendment rights overcome the speaker's rights. *Cohen*, 403 U.S. at 21.[2]

[2] The "captive audience" doctrine encompasses the concept that the government may regulate speech delivered to an "unwilling listener." Marcy Strauss, *Redefining the Captive Audience Doctrine*, 13 Hastings Const.L.Q. 85 (1991). Application of the "captive audience" doctrine results in an ad hoc balancing of the "privacy" rights of an unwilling listener with the free speech rights of the proponent. This balancing test has resulted in the weakening of free speech protection. The use and expansion of the 'captive audience" doctrine "under current levels of scrutiny is lessening the protection the First Amendment previously provided to street preaching." Patrick J. Flynn, *Street Preachers Versus*

"The mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." *Cohen*, 403 U.S. at 21 (citing *Keefe*). The "captive audience" doctrine may only be invoked to sustain an otherwise unconstitutional prior restraint when a substantial privacy interest is being invaded in an essentially intolerable manner. *See Cohen; Rowan; Consolidated Edison.* In *Cohen v. California*, for instance, Mr. Cohen had been convicted of disturbing the peace based on offensive conduct for wearing a jacket with the inscription "F--- the Draft" inside a courthouse. In reversing his conviction, the Supreme Court stated:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority of silence dissidents simply as a matter of personal predilections.

Id. at 21.

Like the listeners inside the courtroom in *Cohen*, respondents have no reasonable expectation of substantial privacy in public areas around abortion clinics.

Merchants: Will the first Amendment Be Held Captive in the Balance?, 14 St. Louis U.Pub.L.Rev. 613, 617 (1995).

A. RESPONDENTS HAVE NO REASONABLE EXPECTATION OF SUBSTANTIAL PRIVACY IN PUBLIC AREAS AROUND ABORTIONS CLINICS.

1. Right To Substantial Privacy Exists In The Home, But Is Not Absolute.

The most compelling cases supporting expectations of privacy for the captive audience doctrine involve the listener in the home. "Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." *Carey v. Brown*, 447 U.S. 455, 471 (1980)(equal protection challenge to residential picketing); *see also Frisby v. Schultz*, 487 U.S. 474 (1988)(picketing of a residence); *Rowan*, 397 U.S. 728 (reception of mail at home).[3]

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[3] In *Gregory v. Chicago*, Justice Black eloquently discussed the value that is placed upon private area such as the home.

> If anyone with a complaint [had] the vast power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits of conduct, social, political, economic, ethical, and religious, would all be wiped out, and become no more than relics of a gone but not forgotten past. . . . [H]omes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life. . . . I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected . . . from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown.

394 U.S. 111, 125 (1969).

Yet, the "sanctity" of the home is not absolute. Where the privacy interest is not substantially violated, or where the listener can avoid the speech, the rights of the speaker will prevail. For instance, in *Martin v. Struthers*, 319 U.S. 141 (1943), this Court struck down an ordinance which forbade any person to knock on doors, ring doorbells, or otherwise summon a resident to the door for the purpose of receiving handbills on the grounds that the invasion of privacy was slight. In *Consolidated Edison*, 447 U.S. at 547, the Court noted that the unwilling recipient of objectionable mail in the home can substantially avoid the speech and "escape exposure to [sic] objectional material simply by transferring [it] from [his hand] to the wastebasket."

These cases make clear that, even in the home, the citadel of the sick and weary, unwilling listeners may be made to endure these minor infringements on their privacy in the interests of others' paramount First Amendment rights to speak.

2. Outside the Home, the Right of Privacy of an Unwilling Listener is Sharply Limited.

An expectation of considerable privacy in public is rarely reasonable. Public and private are opposites; they cannot logically co-exist.[4]

Some limited fora exist in which listeners receive less privacy protection than in the home, but greater protection than in a public forum. City transit vehicles, for instance, are afforded a lesser degree of privacy than that found in the home, greater privacy interest than in public fora, such as

[4] An examination of the privacy rights of a public listener involves both the expectation of privacy and the inability to avoid exposure to speech in public. The latter will be discussed *infra* at section B.1.

parks or streets. *Lehman*, 418 U.S. at 303. In addressing the privacy interest in a courthouse, the Court in *Cohen* suggested that "it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park." *Cohen*, 403 U.S. at 21.

In a public forum, however, one's privacy interest is at its lowest. The Court in *Frisby* clearly pronounced this proposition by holding that "in many locations, we expect individuals simply to avoid speech they do not want to hear." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). Likewise, the *Cohen* Court acknowledged that "we have . . . consistently stressed that we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." *Cohen*, 403 U.S. at 21.

The Supreme Court has clearly separated the important privacy interest of a "captive audience" within the home and the importance of free speech protection in a public forum. This is evident by the statements in *Erznoznik*, that "the limited privacy interest of persons on the public streets cannot justify [] censorship of otherwise protected speech . . ." *Erznoznik*, 422 U.S. at 212.[5]

Clearly, the potential offensiveness of speech has no bearing on the nature of the public listener's privacy right. In *Keefe*, 402 U.S. at 419, for instance, the Court stated that the respondents' "practices were offensive to [the petitioners], as the views and practices of petitioners are no doubt offensive

[5] "It is almost incongruous to discuss privacy in the context of public places. Privacy interests are matched by the corresponding rights of every other individual in the public. If allowed to fully exercise these rights, some individual would veto every other individual's actions." Flynn, at 648.

to others. But so long as the means are peaceful, the communication need not meet standards of acceptance."[6]

In *Erznoznik*, 422 U.S. at 210, the Court held that "[m]uch that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."

A person does retain a reasonable expectation of privacy in his person. He has a right to personal safety and one protects him from assault, threats, and bodily harm. History, tradition, and the common law all agree that he has a privacy right of self-defense for those who invade his "personal space" and any zone of privacy about his person. But that zone of privacy most certainly does not extend 15 feet.[7]

Put simply, "privacy" in public is not to be expected. According to the Court in *Cohen*,

[6] "[T]here must be no restriction on uninvited communications on the ground that either the content of the message or the manner of its expression may be offensive to some persons upon whose eyes or ears it may fall." Franklyn S. Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?*, 67 Nw.U.L.Rev. 153, 197 (1972).

[7] Cases involving protection of an individual's zone of privacy are prevalent. The most familiar of these kinds of cases is the no-contact protective order issued in domestic violence cases. With this type of restraining order, a defendant is prohibited any contact whatsoever with the plaintiff, occasionally with the requirement that the defendant stay a specified distance from plaintiff, such as 300 feet. But to justify this extreme type of restraint, there must be a long history of repeated wrongful or threatening behavior of a specific defendant against a specific plaintiff.

> While this Court has recognized that government may properly act in many situations to prohibit intrusions into the privacy of this home of unwelcome views an ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that *we are often captives outside the sanctuary of the home and subject to the objectionable speech.*

Cohen, 403 U.S. at 21 (emphasis added). In examining the reach of privacy interests into the public arena, the Supreme Court in *Kovacs v. Cooper*, 366 U.S. 77, 86-7 (1949), upheld a regulation prohibiting sound trucks or any vehicles with amplifiers emitting loud and raucous noises from broadcasting while on the city streets, stating:

> The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.[8]

[8] The Court was also careful to distinguish the interference created by amplification devices attached to vehicles from other free speech activities by stating that, "There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers." *Id.* at 89.

3. *Madsen's* "Medical Privacy" Is Not Applicable to This Case.

Of great importance to this case is the way in which *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994) will be applied to this and future cases of abortion clinic protest. The Court in *Madsen* analogized residential privacy to "medical privacy" in upholding the injunction. Yet, the Court was discussing the Florida Supreme Court's application of the strong interest of the State in residential privacy as analogous to that of the medical privacy.[9] Importantly, the *Madsen* opinion does not stand for the proposition that women going to abortion clinics necessarily have a "medical privacy" right which is, *per se*, equal to a residential privacy right. Rather, the *Madsen* case simply held that the "combination of governmental interests" -- including, *inter alia*, regulating non-speech, discussed *infra* -- justify the injunction. The *Madsen* injunction differs in significant respects from the *Schenck* injunction, as do the facts in both cases. Because a determination of the constitutionality of an injunction requires heavy reliance on the facts, these differences are compelling and dispositive.

[9] "The [Florida] court observed that while targeted picketing of the home threatens the psychological well-being of the 'captive' residence, targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." *Id.* At 2526.

B. EVEN IF RESPONDENTS HAVE A SUBSTANTIAL PRIVACY INTEREST IN PUBLIC AREAS AROUND ABORTION CLINICS, THEY CANNOT BE A CAPTIVE AUDIENCE BECAUSE THEY HAVE READY MEANS OF "ESCAPE" AND PETITIONERS' SPEECH IS NOT "INTOLERABLE."

1. The Government Cannot Prohibit Speech To Further Privacy Interests If The Unwilling Listener Can Avoid Exposure.

Only in very rare and special circumstances can a claim of captivity, as in *Lehman*, or an extended zone of privacy withstand constitutional scrutiny.[10] *Lehman*-type captivity requires a finding that all practical avenues of escape be foreclosed. There are few, if any, other instances of this kind of captivity in public.

The Supreme Court has clearly required the listener to take steps to avoid the unwanted speech before any government limitation on the speaker may be enforced. In

[10] Interestingly, the Court in *Lehman* cited to Justice Douglas' dissent in *Public Utilities Comm'n v. Pollack*, 343 U.S. 451 (1952), in support of its decision. In *Pollack*, the Court faced a challenge brought against the government's practice of playing radio programs over loudspeakers located on public passenger vehicles. While holding that there was no infringement on the commuters' constitutional privacy rights, the Court stated that: "However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance. *Id.* at 464. In *Lehman*, the Court had now extended the "captive audience" doctrine beyond the limits of the home, which increased the "weight" of this doctrine when balanced against free speech rights.

striking down a restriction prohibiting a drive-in theater from showing films containing nudity when the screen was visible from the street, the Court stated that "[s]uch selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik v. Jacksonville*, 422 U.S. at 209. The Court in *Erznoznik* recognized that the "offended viewer readily can avert his eyes" and the screen is "not so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Id.* at 212.

In *Consolidated Edison*, 447 U.S. 530 (1980), the Public Service Commission was attempting to silence a viewpoint based on the privacy interests of the "captive audience." *Id.* at 541. The Court responded to this argument by stating that "the First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech." *Id.* at 541-42.[11]

Even in cases involving the heightened privacy interest in the home, the Court has required the homeowner to take steps to avoid unwanted mail. (*See Consolidated Edison*, 447 U.S. 530; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).) The Court astutely recognized that the private homeowner had the constitutional authority to restrict unwanted information, but the government did not. In fact, the Court in *Rowan* stated that it had previously "acknowledged a limitation in terms of leaving with the homeowner himself the power to decide whether distributors of literature may lawfully call a home." *Rowan*, 397 U.S. at 736.

[11] "Rarely, of ever, is anyone truly captive; there is almost always some alternative means the unwilling iistener can take to avoid the message." Strauss, at 86.

The Court in *Frisby v. Schultz*, 487 U.S. 474, upheld a content-neutral ordinance prohibiting picketing in front of a residence against a First Amendment challenge brought by individuals who were picketing outside a doctor's residence who performed abortions. The Court reaffirmed the long-standing principle that public streets are traditional public fora, but tipped the balance in favor of the significant government interest of protecting residential privacy. *Id.* at 484. In defense of the restriction on the free speech of the picketers, the *Frisby* Court stated that:

> The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. . . . The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech.

Id. at 487 (internal citations omitted).

2. The Record Does Not Show That Persons Entering Or Leaving The Abortion Clinics Have No Means To Escape The Messages Of Petitioners.

Whether or not a person is to be considered a "captive audience" outside the home, for purposes of First Amendment analysis, is a mixed question of law and fact. While the District Court below concluded as a matter of law that persons entering and leaving clinics are captive to the

reception of a pro-life message, the record includes no evidence whatsoever that such persons are not reasonably able to avoid any unwanted communication. In addition, there is no evidence that anyone has been "captive" as that term is commonly understood: No one has been deprived of their personal liberty or unduly detained.

The record demonstrates that "there have been no physical 'blockades'" of clinic entrances and exits. *Pro-Choice Network*, 799 F. Supp. at 1424 n.5. The incidents were "usually peaceful in nature," *id.* at 1423; and clinic personnel, "patients," customers, and others were free to come and go as they pleased.[12]

The District Court found generally that "Project Rescue produces and distributes literature . . . engages in correspondence [and] seeks donations," *Pro-Choice Network*, 799 F. Supp. at 1423. At abortion clinics, there was picketing by pro-life demonstrators, congregating in or near driveways, noise-making, chanting, and yelling at persons entering and leaving the clinics. *Id.* at 1424.

There is no indication in the record that any patient was ever surrounded, entrapped, prevented from entering or exiting the clinics, or unable to leave the area. Additionally, there is no finding that sidewalk counselors forced persons to take pamphlets; the record does not show that they shoved pamphlets into the hands or pockets of people.[13]

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[12] At no time did the petitioners organize *en masse* sit-ins, lay down in entryways, link hands or chain themselves together, trespass on clinic premises, or make any other attempt to physically blockade clinic property in an effort to deprive women of their constitutional right to choose an abortion.

Pro-Choice Network, 67 F.3d at 401 (Meskill, J., dissenting).

[13] Occasionally, peaceful yet emotionally charged discourse would take place "in the compressed space at the entrances of the medical facilities." *Id.* at 1425. However, the court made no factual finding that these incidents were sufficient to find the patients to be a captive audience.

Instead, the lower court appears to make its finding on a very narrow ground, that "even when women seeking access to the clinics signal their desire to be left alone, defendants continue to follow right alongside them and persist in communicating their message," (*id.* at 1436), and because they have intended recipients of their message, which the court calls "targeting." *Id.* at 1425 and 1436. But there is no finding that patients were not able to avoid the communication after its initial reception. Unlike the audience in *Frisby*, the audience members have means to avoid unwanted speech by simply averting their eyes from any signs or placards, or walking passed or ignoring speech for the few seconds it takes to leave or enter the clinic.[14]

C. *MADSEN* IS NOT DISPOSITIVE ON THE ISSUE OF CAPTIVE AUDIENCE.

Unfortunately, the *en banc* opinions of the Circuit Court confuse the issue by misstating this Court's decision in *Madsen*, 114 S.Ct. 2516. Both Judge Oakes and Judge Winter give the impression that *Madsen* stood for the proposition that women seeking abortions were captive.

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[14] According to Haiman at 177-78:

> People constantly "turn off" billboard and advertisements, not to mention the sounds of surrounding voices, often without blinking an eye or twitching an ear. Even in the realm of physical movement, one can avert his eyes as quickly from an offensive display sign as he can turn off an unwelcome radio or t.v. message. In neither example is one free to avoid the initial impact, but in both cases one is capable of shutting out, either physically or mentally, any communication beyond that.

Judge Oakes wrote,

> In *Madsen*, the Court acknowledged that . . . "while targeted picketing of the home threatens the psychological well-being of the 'captive' resident," the Court noted, "targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance."

Pro-Choice Network, 67 F.3d at 392.

What Judge Oakes neglects to include in his quotation is that the Court in *Madsen* was merely reciting the Florida Supreme Court's characterization of the case; it was not necessarily adopting those views as its own. Placed into proper context, the *Madsen* Court actually stated, "The *Florida Supreme Court* concluded that numerous significant government interests are protected by the injunction. . . . the *court* observed that while targeted picketing of the home threatens the psychological well-being of the 'captive' resident. . . ." *Madsen*, 114 S.Ct. at 2526 (emphasis added). Properly understood, it is clear that this Court has not found women seeking abortion to be a captive audience.[15]

Even though the *Madsen* Court cited the "captive audience" of the clinic, this doctrine was only one of several interests which in combination justified portions of the injunction. The government interests which were identified in *Madsen* included promoting free flow of traffic on public

[15] It is undisputed, however, that this Court did, in *Casey*, *infra*, endorse the mandated provision, in the closed environment of a clinic office, to women seeking abortion of the same type of information that petitioners, sidewalk counselors, and other pro-life advocates wish to provide in the free and open forum of the public sidewalk.

streets and sidewalks, ensuring the public safety and order, protecting the property rights of all citizens, and protecting a woman's freedom to seek lawful medical or counseling services.

The "floating" bubble zone and the "case and desist" provisions in the *Schenck* injunction do not advance these specific government interests and are clear violations of *Madsen*. Once this "floating zone" and accompanying "cease and desist" provisions are applied beyond the immediate surroundings of the clinic, all of the prior government interests dissipate. For instance, if a counselor approached a would-be clinic patron in a public park, the injunction's cease and desist provision remains applicable, despite the absence of any of the above-cited government interests, such as the lack of free flow of traffic on public streets and sidewalks, protecting the property rights of all citizens, and protecting a woman's freedom to seek lawful medical or counseling services.

Regardless of the indirect acknowledgment of the "captive audience" doctrine, *Madsen* examined each provision of the injunction to determine if it "burdens more speech than necessary to accomplish its goal." *Id.* at 2526. The *Madsen* Court proceeded to strike four of the six provisions of the injunction, one of which was substantially similar to the "cease and desist" provision in *Schenck*. *Id.* at 2530.

The cease and desist provision in the *Schenck* injunction would fail even according to the express language found in *Madsen*. In striking a similar provision which prohibited petitioners from physically approaching any person seeking services of the clinic "unless such person

indicates a desire to communicate," the *Madsen* Court held that:

> [I]t is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (i.e.,"fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand. As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and eve outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment. The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

Id. at 2529 (internal citations and quotations omitted). The cease and desist provision in the *Schenck* injunction has the identical effect as the provision struck in *Madsen*, with the insignificant difference that in the present case, the counselors may first approach the clinic patrons before being dismissed. Additionally, the speech in this case does not rise to the level of being independently proscribable as threats or otherwise proscribable under the First Amendment, and therefore warranting such harsh treatment.

The admonition in *Madsen* that citizens must tolerate even outrageous speech to provide "adequate breathing space to the freedoms protected by the First Amendment" has been completely ignored in here. *See Madsen* at 2529. The *Schenck* injunction has asphyxiated the First Amendment to the extent that its underlying purpose of protecting unpopular speech is lifeless.

To further distinguish the injunction in *Madsen* from the *Schenck* injunction, the former was in response to a previous, more narrow, injunction which was found ineffective. The Court in *Madsen* clearly stated that:

> We also bear in mind the fact that the state court originally issued a much narrow injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic. The failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order.

Id. at 2527. The *Schenck* injunction, which encompasses more speech than even the broader one in *Madsen*, was issued as the original response rather than resulting from an ineffective previous injunction. This realization should increase the examination in reviewing the injunction in *Schenck* because it was not issued in response to a prior ineffective injunction which was more narrow, but began as a broad injunction.

Furthermore, as compared to the present case, the activities in *Madsen* which were cited to justify portions of the final injunction, were much more egregious. In *Madsen*, the Court noted that the protesters were often using

loudspeakers. *Id.* at 2521. Such amplification devices were not used by the counselors in the present case.

Petitioners also stipulated that blocking or impeding access to the clinic may be enjoined. Conversely, in *Madsen*, the precise reason for upholding the 36-foot buffer zone was to "protect[] unfettered ingress and egress from the clinic, and ensuring that petitioners do not block traffic . . ." *Id.* at 2527. The *Madsen* Court further stated that the "need for a complete buffer zone near the clinic entrances and driveway may be debatable," but gave deference to lower court's familiarity with the background of the case because the full factual record was never certified as part of the record. *Id.* Even with the presence of more egregious conduct in *Madsen*, the Court hesitated when upholding the buffer zone around the clinic and driveways. *Id.*

D. EVEN IF RESPONDENTS HAVE A SUBSTANTIAL PRIVACY INTEREST IN PUBLIC AREAS AROUND ABORTION CLINICS, THE POTENTIAL INFRINGEMENT OF THIS INTEREST IS NOT CONSIDERABLE OR INTOLERABLE.

Incidental burdens on an individual's privacy interests while in a public forum are an expected price of a free society.

It has been generally recognized that individuals can even be *made* to listen to things they do not want to hear, at least in those cases where the forced listening was not unduly burdensome. As the Court pointed out in *Rowan*, "we are often 'captives' outside the sanctuary of [places such as] the home and subject to objectionable speech." 397 U.S. at 738. That is the price one must necessarily pay to live in a society

with other people. This is particularly true in the rough-and-tumble world of politics and politically charged issues, such as abortion.

This case involves the stifling of pure speech. Although the court below was concerned with protecting people from alleged negative effects of emotive speech, the Supreme Court has specifically stated that:

> We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Cohen, 403 U.S. at 26. The Court has also previously held that "[t]he emotive impact of speech on its audience is not a secondary effect" sufficient to allow proscription of protected speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Moreover, in *Org. For a Better Austin v. Keefe*, 402 U.S. at 419, the Court clearly stated that "the claim that the expressions were intended to exercise a coercive impact on respondents does not remove them from the reach of the First Amendment."

1. There Are Many Examples Of Individuals Being Compelled To Listen To Messages They Might Otherwise Choose Not To Hear.

Children are compelled to attend schools and listen to their teachers. Sports fans are routinely compelled to listen to, and expected to pay respect to, the Star Spangled Banner,

and sometimes even the national anthem of a foreign nation, such as Canada. Motorists are compelled to read road signs and other forms of governmental speech. Taxpayers are compelled to read the communications published by federal and state governments. Employees find they are unable to avoid speech from government in health, safety, and other regulations.

The courts themselves are not immune from forcing speech upon unwilling listeners. Judicial process effectively makes it a crime for individuals to refuse to become jurors and be required to listen to judges, lawyers, and witnesses, not to mention the criminal defendant, without the right to avoid reception of these messages. Indeed, every admittee to a hospital is required by federal law to receive certain potentially offensive "messages" about their "rights" as a patient. *See* Omnibus Budget Reconciliation Act of 1990, Public Law 101-508 §§ 4206, 4751 (The Patient Self-Determination Act).[16]

Importantly, this Court has upheld state laws requiring that women seeking abortion be given certain state-mandated informed consent information about, *inter alia*, abortion, abortion alternatives, fetal development; the provision of such information was found not to violate the privacy rights of the woman or her doctor. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. __, 112 S.Ct. 2791, 2822-24, 120 L.Ed.2d 674 (1992). Furthermore, the *Casey* plurality noted that, a woman seeking abortion does not have "a right to be insulated from all others in doing so." *Id.* 112 S.Ct. at 2821.

If the privacy rights of the women in *Casey* are not unduly infringed by these messages from the state, certainly the privacy rights of people around an abortion clinic are not

[16] Ironically, these admitted hospital patients, especially those who are very ill, old, or helpless, are precisely the type of listeners who need the protection of a "captive audience" designation.

unduly infringed by messages from private citizens exercising their fundamental right to free speech on a public sidewalk.

2. Petitioners' Speech Is Potentially Beneficial.

Throughout the opinions of the lower courts, it seems to be almost taken-for-granted that respondents, by and large owners and operators of abortion clinics and their employees, speak for each and every woman entering their clinics. While the issue of whether or not the clinics have standing to assert or protect the interests of these women or of those seeking the services of the clinics is not presented here, it should, nevertheless, not be necessarily presumed.

Moreover, it would be unreasonable to believe that each woman that goes to an abortion clinic has irrevocably chosen to terminate her pregnancy by abortion and does not want and desire the viewpoints of others. Many pregnant women "seeking abortion" have not firmly made up their minds to go through with it. Many of them change their minds, often after their initial visit to the clinic. Sometimes they change their minds (and hearts) as a result of discussions with sidewalk counselors. Furthermore, operators of abortion clinics have more than "constitutional" concerns. There is clearly a financial motive for them to encourage women to enter their clinic. When pro-life demonstrators successfully persuade a woman to forego having an abortion, the clinics' interests in their pocketbooks suffer more than their interests in privacy. The inherent conflict-of-interest should not be lightly dismissed.

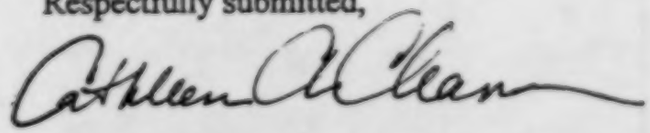
III. CONCLUSION

Respondents are part of a social and cultural movement that holds supreme the right of women to choose to have abortions. Indeed, respondents' own names reveal the object of their advocacy -- "choice" is their very *raison d'être*. Yet, here, respondents urge the Court to ignore their name and disregard their cause, so that women entering abortion clinics can be seen as being there not by "choice," but by necessity. In a word, respondents want this Court to believe that the women are "captives."

There is a sad irony here. Petitioners and this *amicus* have long believed that women are enslaved by abortion. We have tried to show them that they have been misled by abortion activists and manipulated by the abortion industry. Yes, we too believe they are captives. And we shall continue, in whatever avenue is left to us, to try to reach them with the truth, and the prospect of freedom's fulfillment in truth.

The decision of the court below should be reversed.

Respectfully submitted,



CATHLEEN A. CLEAVER
Counsel of Record
Family Research Council
700 Thirteenth Street, NW
Suite 500
Washington, D.C. 20005
(202) 393-2100